M e m o r a n d u m

110.0005

To: San Diego – Auditing (WAS) Date: April 18, 1973

From: Headquarters – Tax Counsel (GLR)

Subject: Z--- S--- of S--- D---, Inc. SR FH 25 000508
S--- D--- W--- A--- P--- SR FH 25 637781

This is in regard to you memorandum of March 13 concerning the application of Section 6358(b) to purchases of feed for Asian and African deer. As you mentioned in your memo, in the past you have treated all deer, antelope, and bison as exempt irrespective of the country of origin. You have based this upon the general classification of animals - - a deer is a deer.

Upon initial reading of Mr. Stetson's letter of May 13, 1959 directed to the S--- D--- Z--- G--- wherein he concluded that all deer are exempt as being animal life of a kind which ordinarily constitute food for human consumption, one could very easily conclude that the "deer is a deer" philosophy is the proper rule. However, it is noted that in his letter he lays down the following test to be used in interpreting Section 6358:

> "We think a proper test is whether the animals or birds in question constitute kinds which are in fact used as food for human consumption in the area where they happen to be located even though they might be actually used there for exhibition purposes."

This rule and the "deer is a deer" philosophy seem to be inconsistent with one another unless Mr. Stetson was only thinking of deer that are normally eaten in this locale, i.e., mule-tail deer rather than all deer. The above-quoted rule was recently reinterated in Robert H. Anderson's hearing report involving M--- W--- M---, copy attached.

In reviewing the material in our files, there is evidence that the "deer is a deer" concept is not followed. For instance, John H. Murray, on January 31, 1964, concluded that a reindeer was not a kind of animal exempt under Section 6358. In addition, you will note that we have not used this concept in dealing with sheep. Annotation 110.0140 goes into the question of whether a particular breed of sheep is commonly used for food for human consumption. One can see that we have not been entirely consistent in this area.

The (b) section of the statute seems simple enough in that it provides that there are exempt from the taxes imposed by this part gross receipts from sales of and the storage, use or other consumption of feed for any form af any animal life <u>of a kind</u> the products of which <u>ordinarily</u> constitute food for human consumption or are to be sold in the regular course of business.

As an exemption statute it is well established that such statutes are to be strictly construed against taxpayers. Strict construction where Section 6358 is concerned requires an interpretation of what the Legislature meant by the words "of a kind" and "ordinarily".

The dictionary definition does not provide us with much help in determining the meaning of the word "kind". One definition is a "natural group or division, i.e., a race". The only court case that I can find that even discusses or is concerned about the interpretation with the words "of a kind" is Glass Tite Industries. Although this case did not involve Section 6358, it was still concerned with the interpretation of those three words. The case basically held that the particular subassemblies or diodes were not "of a kind" sold at retail. The court zeroed in on the question of whether or not these particular subassemblies as distinguished from subassemblies in general were of a kind that were sold at retail. I think it is also possible that the courts in interpreting Section 6358 would ask the question as to whether or not these particular animals are of a kind that ordinarily constitute food for human consumption.

The word ordinarily is one of about three words used to describe things that happen in every day course of events or accepted by most people as normal or natural rather than novel or strange. Ordinarily implies conformity. The fact that some people in Asia and Africa eat or have eaten the particular type of deer does not in and of itself dictate the conclusion that thes particular deer are animals which in this day and age ordinarily constitute food for human consumption within the meaning of what the Legislature intended when enacting the animal life – animal feed statute. I think it would be better to consider the point of whether or not the particular species of deer or animal is ordinarily used for food for human consumption in California as distinguished from some foreign country. For I believe that the Legislature enacting such statute must have been thinking in the vein of what animals do people in California ordinarily eat.

One could argue that the statute should be interpreted in such a way as to limit its application to animal life that is actually purchased for eating purposes rather than for zoos or shows. Unfortunately, I don't think that we can take such a position under the literal language of the statute.

Summarily, I think the test we should follow is whether the particular specie of animal life we are dealing with ordinarily constitutes food for human consumption in California. I will recommend that we amend the regulation to conform to this thinking. In the interim, I would recommend that you contact the taxpayer and start applying this rule from this date forward.

GLR:lb

cc: --- --- – Dist. (WF)
Mr. Robert Nunes
Mr. Donald J. Hennessy